Nos. 22169 and 22169-A

In The

United States Court of Appeals

For the Ninth Circuit

Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO, *Petitioner*

v.

National Labor Relations Board, *Respondent*

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v.

Jens Horstrup, *Respondent*

On Petition To Review and Set Aside, Cross-Petition for Enforcement and Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AMICUS CURIAE

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I. PRELIMINARY STATEMENT

The determination of the issues before the Court in the instant case will have a substantial impact upon the rights of approximately three million building and construction tradesmen who are represented by local unions whose eighteen international unions are affiliated with this Department. The issue, as it affects them and the local and international unions and building trades councils with

which they are affiliated, is whether the councils may apply economic pressure to obtain subcontracting agreements which they are authorized to enter into under Section 8(e) of the National Labor Relations Act, as amended. The interest of the Department in this case arises from the novel approach of the Board in utilizing Section 8(b)(7) in a manner which is directly contrary to the language of the Act and its legislative history so as to proscribe what has been traditionally considered to be lawful activity on the part of local building trades councils affiliated with the Department.

The Department accepts the Council's statement of the case and fully supports its position with respect to the substantive issues before this Court.

II. ARGUMENT

A. The Board's Holding is not Supported by Either the Language of Section 8(b)(7) or the Applicable Legislative History.

In its decision at 165 NLRB No. 86, the Board found that the picketing here in issue had "an object of recognition and bargaining within the meaning of Section 8(b)(7)."[1] The Board's conclusion was founded on the reasons set forth in its decision in *Dallas Building and Construction Trades Council,* 164 NLRB No. 139, a case presenting substantially the same issues as the instant one. In *Dallas,* the Board was a little more specific in defining the nature of the alleged violation of Section 8(b)(7). There, the Board found that the Council picketed "with an object to force these employers to accept the Council's subcontracting clause, at a time when the employers had lawfully recognized and were bound to collective-bargaining agreements with other unions representing their employees."[2] Upon

[1] Board's decision, at p. 2.

[2] *Dallas Building and Construction Trades Council, supra, at p. 10.*

this finding, the Board then superimposed the further finding that the Dallas Council's object in obtaining the subcontracting agreement there was "to represent and bargain for the employees of the employers involved as to subcontracting, within the meaning of Section 8(b)(7)(A)."[3]

It may be well at this point to compare the above findings of the Board with the specific statutory language in question. Section 8(b)(7) makes it an unfair labor practice for a labor organization or its agents:

> "(7) To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization *as the representative* of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified *as the representative* of such employees. . . ." (Emphasis supplied.)

As the question of "organizational" picketing is not involved in this case, the only issue presented is whether the Council's conduct had the object of forcing or requiring the contractor involved to recognize or bargain with it herein as "the representative" of its employees. In other words, the narrow issue before the Court is the meaning and scope of "recognitional" picketing.

For the reasons discussed below, the Department submits that the recognitional object prohibited by Section 8(b)(7) is recognition as the *exclusive* bargaining representative of the employees in question, within the meaning of Section 9 of the Act. In its decision, however, the Board simply disposes of the case under the general designation of "an object of recognition," without examining the type of recognition intended by the Congress to be proscribed under Section 8(b)(7). But, this will not suffice. As Mr. Justice

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[3] Id. at 11.

Frankfurter cautioned in the famous *Sand Door* case, *Local 1976, U.B.C.J.* v. *NLRB,* 357, U.S. 93, 98 (1958):

> "The section [8(b)(4)] does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives."

So it is here; Section 8(b)(7) does not outlaw "recognitional" picketing. It outlaws only picketing or threats to picket with an object of forcing an employer to recognize and bargain with a labor organization as "*the* representative of his employees, . . ." (Emphasis supplied.) That this statutory reference is to recognition as the exclusive bargaining representative is evidenced by the language of Section 8(b)(7) and its subsections. Thus, as noted above, the language of the section refers to "the" representative.[4] Moreover, an exception to the prohibition occurs where the labor organization is "currently certified as the representative;" an unmistakable reference to the machinery of Section 9 of the Act for the selection of the "exclusive representatives." Also unmistakable is the parallelism in the dual use of the phrase, "as the representative," and the import of the requirement of certification in the second instance. In addition, each of the subsections (A)-(C) refers specifically to Section 9(c).

The relevance of Section 9 to Section 8(b)(7) has previously been noted in some detail by the District of Columbia Circuit, which has held that the purpose of Congress in passing the latter was "the encouragement of elections under the aegis of the Board. . . ." *Dayton Typographical*

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[4] The Board cannot, therefore, successfully substitute, in words or effect, "a" bargaining representative for the singular article, "the," chosen by the Congress. The two articles are no more interchangeable with respect to "the representative" in Section 8(b)(7) than they are with respect to "an object" in Section 8(b)(4). See *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689 (1951). The essential point is that Congress was aware of the difference and, in each instance, used that article which expressed its specific intent.

Union No. 57 v. *NLRB,* 326 F. 2d 634, 646 (D.C. Cir. 1963). See also in this regard the Board's own decision in *International Hod Carriers Local 840 (Blinne Construction Company),* 135 NLRB 1153, 1162.

Thus, the language of the Act itself demonstrates the requirement that, for the Board to find a violation of 8(b)(7), the labor organization involved must be seeking recognition as *the* exclusive bargaining representative of his employees within the meaning of Section 9. And, not only was no such finding made by the Board below; no such finding is possible under the facts and circumstances of this case.

If, however, any doubt remains concerning the scope of the prohibition of Section 8(b)(7), that doubt is dispelled by an examination of the legislative history. Senator Kennedy, reporting to the Senate on the agreement of the Conference Committee, discussed that section in the context and traditional jargon of Section 9 procedures as follows:

> "The amendments adopted in the conference secure the right to engage in all forms of organizational picketing *up to the time of an election* in which the employees can freely express their desires with respect to the *choice of a bargaining representative."* Cong. Rec. September 3, 1959, p. 16402; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Government Printing Office, 1959, cited herein as Leg. Hist.), Vol. II, p. 1431. (Emphasis supplied.)

He added, ". . . the prohibitions relate only to picketing in an effort to organize employees or secure recognition *in a bargaining unit covered by the existing contract or the prior election."* Cong. Rec., September 3, 1959, p. 16415; II Leg. Hist. 1433 (Emphasis supplied.)

That the Congress, in referring to recognition "as the representative" of an employer's employees in Section 8(b)(7) was referring to recognition as the exclusive bargaining representative under Section 9 of the Act is demon-

strated even more explicitly by the minority counsel for the Senate Labor Committee, who was in attendance at the Conference Committee meetings. An interview with the counsel, Michael Bernstein, was printed in the Congressional Record by Senator Goldwater and appears in the official Legislative History, beginning at page 1827 of Volume II. At 1828, in discussing the concept of "recognition" picketing, Mr. Bernstein observed that:

> "Now, the law says that, when a majority of them [the employees] pick a union to act as a bargaining agent, that bargaining agent so selected becomes the exclusive representative of all the employees, not just those who voted for the union or who belong to it."

Then, as an example of the forbidden "recognition" picketing, Mr. Bernstein gives this example:

> "Suppose an employer whose employees don't want the union—or the majority of them don't—has a picket line thrown around them, and the union says, 'We want you to sign a contract with us.' he says, 'Well, I can't. I violate the law if I do that. My employees don't want your union, and you don't represent a majority, and, therefore, I am prohibited by law.' " *Ibid.*

Finally, and more explicit still, the Department's position in this regard is supported by the legislative history concerning the enactment of Section 8(b)(4)(B) of the Act, in 1947. That Section prohibited—and still prohibits under the 1959 Amendments—certain activity with an object of, "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such organization has been certified as the representative of such employees under the provisions of Section 9; . . ." Note that Section 8(b)(4)(B), as well as Section 8(b)(7), uses the phrase "the representative of his employees." House Conference Report No. 510, on H.R. 3020, discussed the Senate Amendment—which was adopted

—concerning Section 8(b)(4)(B), as follows:

> "Clause (B) of this provision of the Senate amendment covered strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as *the exclusive representative.*"[5] (Emphasis supplied.)

In short, the Congress has consistently understood and intended, in both the 1947 and the 1959 amendments to the National Labor Relations Act, that the stated phrase, "the representative," refers to "the exclusive representative."

Curiously enough, the Board itself once recognized that the concept of recognitional picketing meant picketing "for the purpose of compelling the Company to extend *exclusive recognition* to it, . . ." (Emphasis supplied.) *Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Etc. (Curtis Brothers, Inc.),* 119 NLRB 232, 234. Subsequently, the Supreme Court, in rejecting the Board's substantive holding in *Curtis Brothers,* stated the nature of the "recognitional" picketing in issue as, ". . . picketing designed to induce Curtis Bros. to recognize the Local as the exclusive bargaining agent for the employees, although the union did not represent a majority of the employees." *N.L.R.B.* v. *Drivers Local Union,* 362 U.S. 274, 277. We find it surprising that the same agency which could "invent" its *Curtis Brothers* doctrine, while at the same time acknowledging the only realistic interpretation of the concept of recognitional picketing, has now chosen to discard the latter along with the former.

In sum, the Department respectfully submits that the unlawful recognitional object in Section 8(b)(7) refers solely to seeking recognition as the exclusive bargaining representative within the meaning of Section 9 of the Act. As

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[5] House Conf. Rept. at 43; Leg. Hist. of the Labor-Management Relations Act, 1947 (Government Printing Office, 1948), Vol. 1, at page 547.

such, and for the reasons set forth in the Council's brief, the picketing herein had no such object and could have had no such object. As was stated over a decade ago by Judge Learned Hand:

> "When Congress limited the wrong to occasions when the cessation was an 'object' to the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about: that which satisfies his aim." *Douds* v. *International Longshoremen's Association,* 224 F.2d 455, 459 (2nd Cir. 1955).

It cannot seriously be contended that the Council's object herein was to obtain recognition as the exclusive bargaining representative of the employees of the contractor involved. Yet, this is the net effect of the Board's holding, particularly since it has itself recognized that, ". . . the provisions of the statute [Section 8(b)(7)] mean conventional bargaining and recognition. . . ."[6]

Section 13 of the Act presents still another bar to the result reached below. And, in this regard, the Board's unwarranted expansion of the scope of Section 8(b)(7) runs directly counter to the Supreme Court's admonition that:

> ". . . Section 13 declares a rule of construction which cautions against an expansive reading . . . which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, Section 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of

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[6] *International Brotherhood of Electrical Workers, Local Union No. 903 (Pass Development, Inc.),* 154 NLRB 169, 176. That decision is also noteworthy for a more realistic appraisal of the object of the picketing there in question than that utilized in the instant case. See further, Section B, *infra.*

the . . . Act." *NLRB* v. *Drivers Local Union, supra,* at 282.

The Department has submitted herein that the language and legislative history of Section 8(b)(7) reveal the limited scope intended by the Congress. At the very least, however, it seems clear that no congressional purpose supporting the Board's "expansive" interpretation of the Section "persuasively appears either from the structure or history of the statute."

B. The Board's Interpretation of Section 8(b)(7) is Incompatible with the Practical Realities of Construction Industry Labor Relations Recognized by the Congress in 1959.

The Board's superficial approach to Section 8(b)(7) totally disregards the realities of construction industry labor relations and the traditional pattern of bargaining in that industry. The craft unions have customarily entered into collective bargaining agreements covering wages, hours and working conditions of the employees they represent in the particular trade, while the local building trades councils with which they are affiliated have sought agreements dealing with problems on job projects which are of general interest to all trades, particularly subcontracting conditions. Indeed, the Congress recognized these traditional bargaining patterns in the construction industry and granted authorization for their continuance by virtue of the new provisions added to the Act in 1959 in Sections 8(e) and 8(f). Even though the Congress saw fit to authorize the making of jobsite subcontractor agreements in the construction industry in the first proviso to Section 8(e), the Board now seeks to nullify the effectiveness of that provision by virtue of its strained interpretation of Section 8(b)(7). Totally apart from all other considerations discussed herein, it is absurd to attribute to Congress the intention of taking away from the scope of traditional construction industry bargaining through Section 8(b)(7)

that which it authorized in Sections 8(e) and 8(b)(4). And, despite any protestations by the Board to the contrary, this is precisely the effect of the Board's holdings in this case and *Dallas*. Yet, under this interpretation, one is hard-pressed to find the harmonious scheme between sections of the same statute which Congress is generally presumed to intend in enacting legislation.

Agreements such as that sought by the Council herein are designed to exist side by side with the bargaining agreements already entered into by the individual craft unions. The two types of agreements involved in this case represent the customary and historic division of functions between building trades councils and member craft unions in the construction industry. The critical distinction is that the craft agreements are employee oriented, while agreements such as that sought by the Council are subcontractor oriented; a distinction recognized on an earlier occasion by the Board. *IBEW Local 903, supra.*

Professor John T. Dunlop of Harvard University, in a careful analysis of the special conditions existing in construction industry labor relations, also drew attention to this distinction and to the particular need for subcontractor agreements in that industry:

> "The labor organizations traditionally have been interested as much, if not more so, in organizing contractors as organizing workers on a particular project. The project is of short duration, and men often have to be organized again on another job; but the signing of a contractor to an agreement means that in the future, work will be bid, started, and performed under union conditions, and workers will be hired through the hiring procedures established under the agreement. The approach to individual workers is seen as a separate problem from signing up contractors."[7]

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[7] Dunlop, *The Industrial Relations System in Construction,* The Structure of Collective Bargaining, 255, 261 (A. Weber, ed. 1961).

The mistaken assumption underlying the Board's decision is that the construction industry is like all others, in that all conditions affecting a group of employees are governed solely by a single bargaining relationship between the local union representing the employees and a specific contractor, and that no other bodies may intrude into or overlap that relationship. While the assumption may have validity in other industries, it is simply at odds with the existing realities of the construction industry. Professor Dunlop discussed in some detail the various bargaining relationships which exist side-by-side and overlap one another in the industry, all affecting in some way the employees at the lowest tier of the bargaining structure. In general, he groups these levels of bargaining as nationwide for all major branches, e.g., the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry; nationwide for particular branches, e.g., International agreements and such bodies as the Industrial Relations Council which has existed since 1919 between the International Brotherhood of Electrical Workers, AFL-CIO, and the National Electrical Contractors Association; area-wide or locality-wide for all major branches; area-wide or locality wide for particular branches; and project-wide for all branches or for single crafts.[8]

To cite a specific example of such overlapping coverage, a local union of the IBEW may have a collective bargaining agreement with a local contractor anywhere in the United States governing the wages, hours and working conditions of the latter's employees. If those parties cannot reach agreement in contract negotiations, the matters in dispute may be referred to the Council on Industrial Relations, established by International agreement between the parent International Union and the national association of which the local contractor is a member. Or, if a jurisdictional

[8] Id. at 263 *et seq.*

dispute develops between that local and another local union affiliated with a different international member of this Department, that dispute may be resolved by the National Joint Board, pursuant to the Constitution of the Department or other local and area-wide agreements requiring the resolution of such disputes by the Joint Board. Thus, the actual conditions under which the employees of the contractor work may be governed not only by the local agreement between their employer and local union, but by a variety of agreements and bodies, of different scope and subject matter, established by the parent and affiliated organizations of both their union and employer.

It is respectfully submitted that the Board's decisions in this case and *Dallas* have totally ignored the interrelationship among the local unions signatory to the agreement with the Eugene Contractors Association and the Council. The Board has treated the Council as a separate, distinct and hostile labor organization when, in fact, it is merely an alter ego for the local unions involved in this case. Each of the local unions is an affiliate of an international union which, in turn, is an affiliate of the Building and Construction Trades Department, AFL-CIO. The Department was established pursuant to a resolution at the 1907 Norfolk, Virginia, Convention, which appears as a Preamble to the Constitution of the Department, and which provided:

> "That a Department of Building Trades of the A.F. of L. be created, said Department to be chartered by the A. F. of L., and to be composed of bona fide national and international building trades organizations, duly chartered as such by the A. F. of L.; and to be given autonomy over the building trades, with authority to issue charters to local building trades; said sections and central bodies to be affiliated with the A. F. of L. *to be composed of bona fide local unions and recognized as such in the building trades.*" (Emphasis supplied.)

The Council in the instant case is chartered by the Department in accordance with the provisions of the Constitution

and for the object as stated in Article II of said Constitution:

> "7. To encourage the formation or establishment of Local Building and Construction Trades Councils in order to aid and assist in the organization and development and *to coordinate the activities of building and construction unions on craft or trade lines.*" (Emphasis supplied.)

Thus, with respect to the scope of recognitional or organizational picketing under Section 8(b)(7), the Council and its constituent local unions cannot be considered as separate and distinct labor organizations either as a matter of law or historical fact.

It is further submitted that the Council, in its effort to establish a clause under the Section 8(e) proviso of the Act, which was a matter of mutual and common interest to all the locals of the Council, did not have as an object the acquisition of recognitional rights within the meaning of Section 8(b)(7). The Board has repudiated decisively the theory in *Lewis Food Company,* 115 NLRB 890, that, "any strike or picketing in support of a demand which could be made through the process of collective bargaining was a strike or picketing for recognition or bargaining." *Blinne Construction Company, supra,* at 1168, fn. 29. The Board there recognized the difference between abstractions and contractual intent when it stated that:

> "We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist."

In this connection it may be well to note *Building and Construction Trades Council of Santa Barbara County,*

AFL-CIO, 146 NLRB 1086, 1087, where the Board stated that:

> "Thus, by attributing a bargaining objective to the Respondent's picketing and by resorting to a strictly literal construction of the statute, it is arguable that the picketing falls within Section 8(b)(7)'s prohibition against picketing to force an employer '*to recognize* or *bargain with* a labor organization as the representative of his employees.' Nevertheless, after analyzing the overall congressional purpose behind the enactment of this section, we are convinced that the words 'recognize or bargain' were not intended to be read as encompassing two separate and unrelated terms. Rather, we believe they were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees. When viewed in this posture, it is clear that Sullivan had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced here and that such picketing therefore was not designed to attain those statutory objectives.' "(Emphasis in original.)

It is thus clear that, when a realistic evaluation of the interrelationship between the Council and its constituent local unions is made, the labor activity here involved did not present a case where one union is seeking to gain recognition where another has been lawfully recognized. (This, of course, is *a fortiorari* if the Court accepts the view of the Council in its brief that Chambers did not abandon his agreement with the Council and, therefore, was under a duty to bargain with it.)

It is also clear, on any interpretation of the facts in this case, that the Council did not have as an object the organization of the employees who were already members of its constituent locals.

It may be that the effort of the Council to secure a clause valid under Section 8(e) was in part a violation of Section 8(b)(3), insofar as it affected those locals which had bargained for such a clause in their separate negotiations with

the Eugene Contractors Association and had abandoned the effort in return for concessions on other points. This question, however it should be resolved, is not presented by this case, since no charge of violation of Section 8(b)(3) was made. In any event, proof of violation of Section 8(b)(3) (which was not charged) obviously does not constitute proof of violation of Section 8(b)(7), which is the sole issue in this case.

It is ironic that the Board, with more than thirty years' experience and expertise in the labor relations field, appears to be less cognizant of existing realities in this industry than the other branches of the Government with their very diverse responsibilities. We have referred above to the special recognition accorded the problems of the construction industry by the Congress in 1959. Unions and employers in this industry have had to look also to the judicial branch for relief from Board doctrines which are inconsistent with the intent of Congress. Shortly after passage of the 1959 amendments, the Board issued its *Colson and Stevens* decision,[9] in which it found that picketing to obtain a subcontracting agreement lawful under Section 8(e), violated Section 8(b)(4)(A) of the Act. In that and several following cases, the unions involved sought review of the Board orders, believing the Board's *Colson and Stevens* doctrine to be at odds with the plain language of the Act and the legislative intention of its drafters. Not until the United States Court of Appeals in three different Circuits had rejected that doctrine, did the Board abandon it.[10] Now,

[9] *Construction, Production & Maintenance Laborers Union Local 383, AFL-CIO,* 137 NLRB 1650.

[10] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B.,* 323 F.2d 422 (9th Cir. 1963); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc.* v. *N.L.R.B.* 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al.* v. *N.L.R.B.,* 328 F.2d 534 (D.C. Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al.* v. *N.L.R.B.,* 328 F.2d 540 (D.C. Cir. 1964).

once again, the Board has formulated a doctrine which is inconsistent with the language of the Act and its legislative history, as well as the realities of the industry involved.

III. CONCLUSION

The Council's picketing is not organizational picketing within the meaning of Section 8(b)(7) because it did not attempt to organize any employees to join the Council as a labor organization. Nor is any contention made to that effect. The Council's picketing is not recognitional picketing within the meaning of that Section because it was not seeking recognition by Chambers as the exclusive bargaining representative of its employees; the only form of recognitional picketing proscribed by Section 8(b)(7). Rather, the picketing below had as its only object the obtaining of subcontractor agreements; an object specifically permitted by Sections 8(e) and 8(b)(4)(A) of the Act. Such object is not unlawful under Section 8(b)(7) or any other section of the Act. The Board's decision to the contrary constitutes an erroneous interpretation of the plain language of the Act and its legislative history, is incompatible with the realities of bargaining in the construction industry and should, therefore, be reversed.

For all of the foregoing reasons, and those presented in the Council's brief, the Department respectfully submits that this Court should deny enforcement of the Board's Order and order the complaint dismissed in its entirety.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAURENCE J. COHEN